No. 13,131

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM R. DAVENA, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, William R. Davena, Jr., was indicted on February 21, 1951, in the District Court for the Northern District of California, Southern Division, as follows:

Count One—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of $943.06 for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

Count Two—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of $831.50 for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

Count Three—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of $3,134.96 for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

The appellant was arraigned on March 14, 1951, before United States District Judge George B. Harris, at which time appellant moved to have the plea and all further proceedings removed to the United States District Court for the Northern District of California, Northern Division, by reason of the residence of the appellant at Benicia, Solano County, California, within that Division, and it was so ordered. On April 11, 1951, the appellant entered a plea of "not guilty" to each count of the indictment. Trial was had in the District Court before the Honorable Dal M. Lemmon, District Judge, and on July 12, 1951, the jury returned a verdict finding the appellant guilty on each count of the indictment. On July 13, 1951, the District Court adjudged the appellant guilty as charged and convicted and ordered him committed to the custody of the Attorney General for a period of thirty months on each count, such sentences to run concurrently, and further ordered him to pay a fine of $2,500 on the third count, in the event of the nonpayment of which he was to be further imprisoned

until the fine was paid or until he was otherwise discharged pursuant to law. (R. 234.) Immediately prior to judgment, appellant moved for a new trial, which motion was denied. (R. 234.)

Notice of appeal was filed on July 13, 1951, and bail on appeal set at $10,000. (R. 236.)

STATUTE INVOLVED.

Title 26, Internal Revenue Code; Sec. 145(b):

PENALTIES

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

During the years 1944 to 1946, inclusive, the appellant, William R. Davena, Jr., was regularly employed as Chief of Police and Chief of the Fire Department of the City of Benicia, California. (R.

64, 70.) He had held the position of Police Chief for a period of five years until May of 1948, and at the time of trial had been Fire Chief for approximately eighteen years. (R. 70, 103.) He was paid a salary by the City of Benicia during 1944 to 1946, inclusive, and after September 3, 1946, received $40 a month maintenance for his automobile from the City. (R. 66, 70.) A small amount of additional income from services of legal papers was reported on his returns. (Government's Exs. 2, 3, 4.)

On March 15, 1945, William R. Davena, Jr., and Genevieve Davena, his wife, filed a joint income tax return for the year 1944, reporting an adjusted gross income of $3,475 and income tax of $262.97. (Government's Ex. 2; R. 29.) On April 15, 1946, they filed a joint return for the year 1945, reporting net income of $2,972.87 and income tax of $253.76. (Government's Ex. 3; R. 29.) On April 4, 1947, a joint return for the year 1946 was filed reporting net income of $3,620 and tax of $240. (Government's Ex. 4; R. 29.) Only the salary received from the City of Benicia and miscellaneous fees for the service of legal papers were reported on these returns. (R. 88.)

Jerry Robinson testified that she ran a rooming house in Benicia which was, at times, a house of prostitution on the side during the years 1944 to 1946, and that during that time she gave the appellant three or four hundred dollars, hoping for favors. (R. 33, 36.) The appellant stated on several occasions to Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, that he had received money from

a madam named Jerry Robinson, and generally from gamblers (gambling) and prostitutes (prostitution) during the years 1944 to 1946, inclusive, and that he had received no other unreported income during the period. (R. 81, 82, 88, 89, 115, 116, 118, 120.) He also stated to Mr. Thurman that he kept no record of this income, which he called "promotion" income, nor was Mr. Thurman able to find such records or any third-party records. (R. 83.) The money which the appellant received from this source was not deposited in a special bank account; however, a portion of it was used to liquidate the mortgage on his home in the amount of $3,758.66, and another part ($6,000) was deposited to a savings account with the Bank of America in Vallejo, California. (R. 89, 41.) The appellant stated to Mr. Thurman that this account in Vallejo was established because he "didn't want the local people to know that he had more money coming in than would be accounted for by his salary." (R. 83.)

Witnesses to establish the net worth of the appellant at the end of each of the years 1943 to 1946, inclusive, were presented by the United States as follows:

(1) Frank Bernardo, Manager, Bank of America, Benicia, California, testified that the balances in the appellant's savings and commercial accounts at that bank were as follows:

	SAVINGS ACCOUNT	COMMERCIAL ACCOUNT
December 31, 1943	$ 504.08	$ 635.60
December 31, 1944	920.39	791.30
December 31, 1945	929.61	1,061.60
December 31, 1946	1,090.05	847.42

He also testified that appellant purchased a cashier's check for $3,758.56 in cash on December 7, 1945. (R. 38, 39, 40.)

(2) Robert E. Arvedi, officer of the Bank of America, Main Branch, Vallejo, California, testified that appellant opened a savings account at his bank on July 15, 1946, depositing $6,000 in cash at that time, and that the balance of that account on December 31, 1946, was $6,000. (R. 40, 41, 42.)

(3) Gary Rees, Manager of the Solano Title Company, Solano, California, testified that his records showed the receipt of a cashier's check of $3,758.66 on December 8, 1945, from Davena, which amount was paid to Eduardo A. Silveira and his wife by the company in satisfaction of the balance due of the sale price of 127 West "J" Street, Benicia. (R. 42, 43, 44.)

(4) Mrs. Leonora F. Silveira testified that she owed the seller's interest in the 127 West "J" Street property, having acquired it on July 1, 1943, when the balance due on the purchase of that property by Davena was $4,913. She stated that Davena thenceforth paid $35 a month principal and interest until December 5, 1945, when he informed her that he wanted to pay the balance; and that she received a check therefor out of escrow on April 12, 1946. (R. 45, 46, 47; Government's Ex. 7.)

(5) Mary Russold testified that her husband made certain improvements to the Davena residence, and that $750 was paid in the latter part of 1945 and $400

in January 1946 by Davena for such work. (R. 48, 49.)

(6) Genevieve Bennett testified that she sold the appellant a house at 125 West "J" Street, Benicia, California, in the latter part of 1946 or not later than January 1947 for a total price of $7,150, which was paid in cash. (R. 51, 52.)

(7) E. R. Trethway, Credit Manager, Earl C. Anthony, Inc., San Francisco, California, testified that his company delivered a Packard automobile to the City of Benicia on May 31, 1944, at a total cost of $2,172.91, and it was then stipulated that the automobile had been purchased by the appellant and paid for by him from his own funds. (R. 56, 58.)

(8) Frank Coronado, automobile dealer, Coronado, California, testified that the appellant purchased a Packard automobile from him on September 11, 1946, for $2,671.53, less trade-in allowance on a 1942 Packard of $1,268, and that the appellant paid the difference in cash. He further stated that he repurchased the same automobile from the appellant on April 20, 1948, for $2,500. (R. 59, 60, 61.)

(9) Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, testified that he examined the appellant's safety deposit box at the Bank of America, Benicia, on February 23, 1949, and found therein War Bonds of the face amount of $100 purchased in 1942 and 1943, of $125 purchased in 1944, and of $100 purchased in 1945, and that the purchase

price was three-fourths of the face amount. (R. 77, 78.) He stated that the appellant told him that he had purchased these bonds from his own funds, and that they were in the joint names of the appellant and his minor children or his wife. (R. 79.)

(10) Mr. Thurman further stated that he had made an investigation to determine the liabilities of the appellant at the end of the years 1943 to 1946, inclusive, but was unable to find any such except the loan payable to Eduardo Silveira, which had been made in connection with the purchase of his residence. (R. 156.)

(1) Robert W. Davis, Deputy Collector of the Bureau of Internal Revenue, testified that he investigated a claimed gift or inheritance to the appellant from his mother, and found that there was no probate record of such an estate in the county of her residence. (R. 165, 166.)

He further testified that he made an investigation to determine charge accounts which appellant may have maintained, but found no such at firms with which appellant had stated he had dealt. (R. 166.)

(12) John H. Reedy, Deputy Collector of the Bureau of Internal Revenue, testified that the records of his office showed that the appellant paid taxes of $285.60 in 1944, $270 in 1945, and $188.80 in 1946, and that he received a refund of 1943 taxes in 1944 of $52.51, a refund of 1944 taxes in 1945 of $22.63, and a refund of 1945 taxes in 1946 of $16.24. (R. 32; Government's Exs. 1, 2, 3, 4.)

(13) Augustus V. Brady, Technical Advisor, Penal Division, Office of Chief Counsel, Bureau of Internal Revenue, testified as an expert witness as to the computation of allowable depreciation on automobiles used for business purposes and as to the computation of income by the net worth method. (R. 183 *et seq.*) According to his computations, depreciation would be allowable to the defendant in the respective amounts of $334.52 for the year 1944 (R. 182, 185); $402.12 for 1945 (R. 186); and $490.83 for 1946. (R. 186, 187.)

The foregoing independent evidence of net worth was supplemented by admissions which the appellant made to Mr. Thurman and Mr. Davis on several occasions and, in particular, by a document signed by the appellant and submitted by him to the Government. (Government's Ex. 9; R. 94.) This document was prepared by the appellant and received by the Government agents from Hartley Russell, the appellant's tax adviser. (R. 93.) Mr. Thurman and Mr. Davis took it to the office of Mr. Russell on December 7, 1949, where they met with Mr. Davena and Mr. Russell. (R. 91, 94.) The details of appellant's net worth, as originally set out by typewriter on Exhibit 9 were individually discussed, and some changes were made by the appellant on the document in his handwriting, after which he signed it. (R. 94.)

The corrections pertinent to the years in question which were made on Exhibit 9 included (1) insertion of year-end balances of appellant's commercial bank account at the Bank of America, Benicia, which had

been omitted from the original schedule (R. 96); (2) increase of furniture from $2,000 to $3,000 at the end of 1946 (R. 97); (3) correction of appellant's investment in model trains (R. 97, 98); (4) correction of cost of his wife's fur coat to include excise and sales taxes (R. 98); and (5) correction of purchase price of home and date of purchase. (R. 99, 157.) The original totals were not changed. (R. 99.) All other items on the schedule were discussed and stated to be correct by the appellant. (R. 97, 98.) With respect to the figures of $6,563 and $6,963, shown on the schedule as his equity in his home at the end of the years 1945 and 1946, respectively, he stated that this included the original cost of his home, plus the improvements which he had made to it in 1945 and 1946. (R. 97.) He also stated that he had no liabilities during this period. (R. 99.)

At the close of the conference, the appellate wrote the following at the bottom of the schedule:

> "This statement of my assets an liability is correct to the best of knowledge and belief.
>
> [signed] "W*m* Davena Jr." *(sic)*

Hartley Russell and Robert Davis then signed as witnesses and dated the document. (R. 99; Government's Ex. 9.)

At an interview with Mr. Thurman on July 22, 1949, Mr. Davena stated that he gave his wife for living expenses during the years in question about $160 a month and that his house payment was included in this amount. (R. 90.)

At an interview on February 23, 1949, the appellant stated to Mr. Thurman that three years prior he had received $5,000 in cash from his father, which was money which had been left to him by his mother at the time of her death; that there was no record whatsoever of this gift; and that he spent the money shortly after he received it. (R. 80.) In May of 1949, the appellant mailed a verified document to Mr. Thurman wherein it was stated that this gift was made in 1947. (R. 84, 85; Government's Ex. 8.) On December 7, 1949, after signing the schedule of net worth (Government's Ex. 9), he stated, with respect to this claim, "That is a lie. I never got anything." (R. 100, 166.)

Mr. Brady computed net worth, income and tax due thereon in response to hypothetical questions based on facts and matters in evidence, as follows:

	12/31/43	12/31/44	12/31/45	12/31/46
Assets				
Cash in Savings Acct. #646, Bank of America, Benicia	$ 504.08	$ 920.39	$ 989.61	$ 1,090.05
Cash in Savings Acct. #3425, Bank of America, Vallejo	.....	.....	.....	6,000.00
Cash in Com'l Acct., Bank of America, Benicia	635.60	791.30	1,061.60	847.42
Cash on Hand	4,800.00	9,000.00	6,000.00	3,000.00
Fur Coat	.....	.....	1,225.00	1,225.00
Equity in Home at 127 "J" St., Benicia	789.00	969.00	4,913.00	4,913.00
Improvements to Above by Russold	.....	.....	750.00	1,150.00
Other Improvements to Above	.....	.....	900.00	900.00
War Bonds	75.00	168.75	243.75	243.75
House at 125 "J" St., Benicia	.....	.....	.....	7,150.00
Furniture at 127 "J" St., Benicia	1,250.00	1,250.00	1,500.00	3,000.00
Model Trains	500.00	500.00	500.00	1,000.00
Automobiles	1,600.00	2,172.91	2,172.91	2,671.53
Guns	200.00	.....	.....	.....
Total Assets	$10,353.68	$15,772.35	$20,255.87	$33,190.75
Liabilities				
Total Liabilities	None	None	None	None
Net Worth	$10,353.68	$15,772.35	$20,255.87	$33,190.75
Increase in Net Worth		$ 5,418.67	$ 4,483.52	$12,934.88
Plus—Federal Income Taxes Paid as Shown on Returns— Withholding on Salary		285.60	270.00	188.80
Less—Refund Received on Previous Year's Taxes		(52.51)	(22.63)	(16.24)
Net Amount of Taxes Paid		$ 233.09	$ 247.37	$ 172.56
Living Expenses		1,920.00	1,920.00	1,920.00
Total		$ 7,571.76	$ 6,650.89	$15,027.44
Minus—Depreciation Allowable on Cars Used for Business		334.57	402.12	490.83
Balance—Adjusted Gross Income as Corrected		$ 7,237.19	$ 6,248.77	$14,536.61
Adjusted Gross Income as Reported		3,475.00	3,560.00	3,620.00
Difference—Unreported Income		$ 3,762.19	$ 2,688.77	$10,916.61
Tax Liability		$ 1,070.60	$ 899.16	$ 3,586.95

On the occasion of his first interview with Mr. Thurman on February 23, 1949, appellant stated, when he learned who Mr. Thurman was, "Well, I have been expecting you, there has been quite a bit of talk around Benicia that I was going to be investigated by the Bureau of Internal Revenue ever since about 1947 when the town was closed up." (R. 75.) He was warned at that time by Mr. Thurman that he didn't have to give information and could refuse to talk. (R. 77.)

Appellant also stated at this time that he had received some money from gamblers and prostitutes, but wanted to talk to somebody before discussing the matter with Mr. Thurman. (R. 81.) Mr. Thurman asked him if he thought these payments were taxable, and he said "Yes," that he knew the amounts he had received were taxable because there was so much information about it in the newspapers nowadays. (R. 90.)

At his next meeting with Mr. Thurman, on March 8, 1949, he said he had received promotion payments, but not during 1944, 1945, and 1946. (R. 81.) He said that he had reported $1,800 from this source in his 1947 income tax return and that he had received $1,900 therefrom in 1948, which he intended to report on his 1948 return. (R. 154.) Asked what he meant by promotions, he said that that was the money he had received from gamblers and prostitutes. He was then asked about the receipt of money from a madam operating a house of prostitution named Jerry Robin-

son, and he replied he had received some money from her. In response to a question, he then stated that Miss Robinson went out of business in 1946. (R. 81, 82.) He further stated that he received this promotion money in currency, usually $20 bills. Asked if he kept large sums of money on hand, he said, "No," that he wasn't the kind of person to keep cash in his safe deposit box and that he never had very large sums of currency on hand at any time. (R. 82.) He further stated that he made the large $6,000 deposit to the Bank of America at Vallejo, California, because he didn't want the local people to know that he had more money coming in than would be accounted for by his salary. (R. 83.)

However, at interview with Mr. Thurman on July 22, 1949, at which his attorney, Harold Simon, and his tax adviser, Hartley Russell, were present, he stated that the source of his income during the years 1944, 1945, and 1946 was his salary as Fire Chief and Police Chief and from gambling *(sic)* and prostitutes, and that he had reported only his salary, and had omitted from his returns his income from other sources, which he estimated at $2,000 per year. (R. 88.) Appellant said he had deposited in the bank some of the money which he received from prostitutes and gamblers, but not until 1945 and 1946, and that he had used portions of it in liquidating a mortgage on his home in the amount of $3,758.66 and in making a deposit of $6,000 at the Bank of America, Vallejo. (R. 89.) He explained his failure to report this income as follows:

> "I figured they were just hand-outs, a sort of a gift, I didn't know I had to pay income taxes on them." (R. 89.)

He denied that he had omitted it from fear that the local authorities might find out about it. (R. 89.) He stated he avoided depositing the money in the local banks because it wouldn't look right having more money than his salary. (R. 89.) At the end of the interview, however, Mr. Russell made the statement that Mr. Davena did not report "gratuities for fear of apprehension from local authorities." (R. 89, 90.)

On October 24, 1949, Mr. Davena stated to Mr. Davis that he would have reported his outside income had he known income tax returns were confidential. (R. 164.)

QUESTIONS PRESENTED IN THIS CASE.

(1) Is the evidence sufficient to support a verdict of guilty on each count of the indictment?

(2) Was there sufficient proof of a *corpus delicti* to warrant admission of the testimony of agents of the Bureau of Internal Revenue concerning statements made to them by the appellant?

ARGUMENT.

I.

THE EVIDENCE SUPPORTS THE VERDICT OF GUILTY AS TO EACH COUNT OF THE INDICTMENT.

A.

Scope of Review on Questions of Insufficiency or Weight of Evidence.

It is a well-established principle that an appellate court will indulge in all reasonable presumptions in support of the ruling of a trial court and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. (2d) 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, ... F. (2d) ..... (C.A. 9th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th).

The proof in a criminal case need not exclude all possible doubt but "need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt."

Henderson v. United States, 143 F. (2d) 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, ... F. (2d) ..... (C.A. 9th).

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254.

B.

Since the Sentence Imposed, Including the Fine, Did Not Exceed That Which Might Lawfully Have Been Imposed Under Any Single Count, the Judgment Upon the Verdict Must Be Affirmed If the Evidence Sustains the Conviction on Any One Count.

The appellant was sentenced to thirty months imprisonment on each of the three counts of the indictment, the sentences to run concurrently. In addition, the appellant was fined the sum of $2,500 on the third count.

It has long been the rule that if the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts.

Abrams v. United States, 250 U.S. 616, 619;

Pierce v. United States, 252 U.S. 239, 252-253;

United States v. Trenton Potteries, 273 U.S. 392, 401, 402;

Sinclair v. United States, 279 U.S. 263, 299;

Whitfield v. Ohio, 297 U.S. 431, 438;

Norwitt v. United States, ... F. (2d) ..... (C.A. 9th).

The concurrent sentences of thirty months on each count and the fine of $2,500 on the third count were within the maximum specified for any one count in 26 U.S.C.A., Section 145(b).

C.

There Was Sufficient Proof of Income Willfully Omitted by the Appellant From His Income Tax Returns.

The Government proved the taxable income of the appellant by the use of the net worth method. The appellant argues that the Government was not entitled to use that method for the reason that it did not establish that the books and records maintained by the appellant were so inadequate that net income could not have been determined therefrom. (Appellant's brief, pp. 28, 29.) No cases are cited by appellant to establish this proposition.

It is not the law that the Government must show the books and records of a defendant to be inadequate in order to use the net worth method of proof of income.

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

Gariepy v. United States, 189 F. (2d) 459, 461 (C.A. 6th);

United States v. Hornstein, 176 F. (2d) 217, 220 (C.A. 7th);
Bell v. United States, 185 F. (2d) 302 (C.A. 4th).

In any event, Mr. Thurman, a Government investigator, testified that he was unable to find any records of this income and, further, that the appellant told him that he kept no records of his outside income from gamblers and prostitutes. (R. 83.)

Appellant contends that the testimony of Jerry Robinson was insufficient to establish unreported income in a substantial amount or at all; and further argues that proof of such specific unreported income is a necessary prerequisite of the use of the net worth method of proof of unreported income by the Government in a criminal case. (Appellant's brief, pp. 22-24.) Miss Robinson took the stand to testify that she ran a house of prostitution at Benicia during the years 1944 to 1946, inclusive, and during the time of appellant's tenure as Chief of Police of Benicia. She further testified that she paid moneys over to him at various times in the hope that she would receive favors. Her testimony, together with the admissions of the appellant to the Government agents that he took "promotion" money from gamblers and prostitutes while he was Chief of Police of Benicia, is more than sufficient to establish a source of unreported income as computed by the net worth method. Indeed, the appellant made statements more than once that this was the source and the only source of the income which he did not report. (R. 88, 89, 100.)

In any event, it is not necessary for the Government to introduce proof of specific unreported income or a source thereof as a prerequisite to the use of the net worth method of proof of unreported income.

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

Gariepy v. United States, 189 F. (2d) 459, 463 (C.A. 6th);

United States v. Hornstein, 176 F. (2d) 217, 220 (C.A. 7th);

Schuermann v. United States, 174 F. (2d) 397, 399 (C.A. 8th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th).

Appellant argues that the Government in arriving at the net worth of the appellant assumed facts which were most detrimental to appellant's position. (Appellant's brief, p. 21.) In this respect, he claims that appellee did not take into account the following items:

(a) The fact that appellant had a net worth of some $5,300 at the time of his marriage in 1938;

(b) The fact that appellant received a gift of $5,000 from his mother three or four years prior to the start of the investigation of this case;

(c) The evaluation of an electric train at $500 instead of $1,500 on December 31, 1943;

(d) The purchase of a home for $7,150 in 1946, whereas payment was not made until January 7, 1947;

(e) Computation of tax on the basis of a joint return as filed by appellant and his wife, whereas appellant could have filed a return separate from his wife on the community property basis.

With respect to the contention concerning an alleged net worth of appellant of $5,300 in 1938, the evidence presented by the Government established that appellant's net worth on December 31, 1943, was $10,353.68. For the items comprising this total, see hypothetical questions addressed to Augustus V. Brady, Technical Adviser, Bureau of Internal Revenue, and schedule incorporated in statement of facts, *supra.* (R. 187-188.)

As to the claim that appellant received $5,000 from his mother during one of the years involved, the appellant stated to Mr. Thurman, when he attempted to make inquiry respecting it, that his previous statements with respect to that gift had been a lie and that he "never got anything." (R. 100, 166.) In addition, appellant made the statement under oath on an earlier occasion, that such a gift had been received in the year 1947. (Government's Ex. 8; R. 84-87.)

As to the evaluation of the trains, the Government was entitled to rely on the statement made by the appellant in writing on Government's Exhibit 9. At the time this net worth statement was corrected and signed by the appellant, there was a full discussion relating to the evaluation of the trains, and a letter which was received by the Government at a later date attempting to make a further and incomplete state-

ment as to their evaluation should not be conclusive or binding upon the Government in any way.

With respect to the purchase of a home by the appellant in December of 1946 or the first week of January, 1947, the evidence is that the appellant paid cash in the amount of $7,150. The time of the purchase was discussed by the appellant and Mr. Thurman at the time Government's Exhibit 9 was corrected and signed, and it was determined that the purchase had been in the year 1946 and that in addition at the end of the year 1946 appellant had cash on hand in the amount of $3,000. Considering the purchase made, nevertheless, in the first week of January, 1947 and not during the year 1946, it is apparent that the appellant had additional cash on hand in the approximate amount of $7,150, and the inclusion of this sum in the Government's net worth computations, whether denominated residence or cash on hand, is warranted.

Appellant argues that the computations made by Mr. Brady were based on the fact that appellant filed joint returns during each of the years 1944, 1945, and 1946, whereas if appellant had so desired he could have filed separate returns based upon the community property basis and that if he had done so and had been given credit for the different evaluation of certain assets above discussed, the tax due by appellant for the three years in question would have been $344.32 on his separate income tax returns and that, therefore, the deficiency in tax would not have been

substantial. He cites, in support of his proposition that a deficiency must be substantial to support a conviction in a tax evasion case, the cases of *Gleckman v. United States,* 80 F. (2d) 394 (C.C.A. 8th), and *Tinkoff v. United States,* 86 F. (2d) 868 (C.C.A. 7th). These cases simply stand for the rule that the Government is not required to prove an evasion of all the tax charged in the indictment and that it is sufficient if any substantial portion of a tax was defeated and evaded. *Tinkoff v. United States,* 86 F. (2d) 868, 878 (C.C.A. 7th), and *Gleckman v. United States,* 80 F. (2d) 394, 399, 400 (C.C.A. 8th) make it clear that so long as there is proof that there was *some* tax due over and above that returned by the taxpayer there is sufficient basis for a conviction under 26 U.S.C., Section 145(b).

With respect to appellant's argument as to the net worth items making up the Government's computation of net worth based upon hyopthetical questions addressed to Augustus V. Brady, Technical Adviser of the Penal Division, Bureau of Internal Revenue, it appears that appellant argues that the hypothetical questions assumed facts which were most detrimental to appellant's position.

A hypothetical question is proper where there is evidence tending to prove all of the facts assumed, and it includes all of the material facts which the evidence tends to prove and which bear upon the subject with regard to which the expert is asked to express an opinion. In the case of *Guzik v. United*

States, 54 F. (2d) 618, 619 (C.C.A. 7th), the Court quoted, with approval, from *Jones' Commentaries on Evidence,* Sections 1327 and 1328, as follows:

> "Where the facts are in dispute it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case. It cannot be expected that the interrogatory will include all the contentions or theory of the adversary, since this would require a party to assume the truth of that which he generally denies. * * * Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. A question should not be rejected because it does not include all the facts of which there is any evidence at all. * * * Generally speaking the trial court is the arbiter of the propriety of the question; and the real test of the propriety of any given hypothetical question is its fairness."

In the case of *United States v. Johnson,* 319 U. S. 503, 519, the Circuit Court had held that admission of testimony of an expert witness regarding Johnson's income and expenditures during the disputed period invaded the jury's province. The witness gave computations based on substantially the entire evidence in the record as to Johnson's income.

> "* * * The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear

and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

See also

Gleckman v. United States, 80 F. (2d) 394, 400 (C.C.A. 8th).

Secondly, appellant was permitted to ask Mr. Brady a hypothetical question based upon the very assumptions that he now complains the Government did not make in its direct examination of Mr. Brady. (R. 203, 206, 221.) Furthermore, when appellant filed joint returns for the years in question under the applicable

law at that time, he made an election to file a joint return and once this election has been made by a taxpayer returns cannot thereafter be filed on any other basis. 26 U.S.C.A., Section 51; and *Morris v. Commissioner of Internal Revenue,* 40 F. (2d) 504 (C.C.A. 2d).

The jury had before it in this case more than ample evidence of unreported income, which consisted of bribes taken by the appellant from gamblers and prostitutes during each of the years 1944, 1945, and 1946. A self-confessed madam of a house of prostitution testified that she bribed the appellant from time to time during these years. The appellant admitted receipt of bribe money, which he called, with significance, "promotion" money, from this madam as well as from other prostitutes and unknown gamblers. His deprecatory estimate was that he received only $2,000 a year from this source. (R. 88.) The independent testimony of third party witnesses as to his assets, coupled with his corroborating statements to the Government investigators in that respect, shows by positive and convincingly overwhelming evidence that these bribes amounted to thousands of dollars more than $2,000 a year. Nor did appellant see fit to take the stand and deny the existence of his large increase in net worth over the three year period 1944 to 1946, inclusive. As was said in *Bell v. United States,* 185 F. (2d) 302, 308 (C.A. 4th):

> "Bearing this evidence in mind and the complete failure of the defendant to controvert it, and having regard for the rule that evidence must be taken in the light most favorable to the

> government in considering its sufficiency, we have no doubt that the submission of the case on the comparison of the taxpayer's net worth at the beginning and end of the tax years was justified, and that the evidence was sufficient to support a verdict of guilty."

Not only was the evidence of a large amount of unreported income more than adequate to support a conviction but the evidence of the appellant's willful intent to evade taxes on the bribes which he accepted was also plain and clear. When first contacted by Mr. Thurman on February 23, 1949, he told him that he had been expecting an investigation ever since about 1947, when the town of Benicia had been "closed up." (R. 75.) Asked by Mr. Thurman if he thought that bribes were taxable, he said "Yes," because there was so much information about it in the newspapers. (R. 90.) Appellant established a bank account in another town—Vallejo—because, he told Mr. Thurman, it wouldn't look right, that he did not want the local people to know that he had more money coming in than would be accounted for by his salary. (R. 83.) It is an obvious inference that he did not want the Bureau of Internal Revenue to know about this income as well.

Appellant made contradictory statements to Special Agent Thurman with respect to an alleged $5,000 cash gift saying, first, that he received this money in 1946 (R. 807); later, by means of a sworn affidavit, that the money had been received in May of 1947 (Government's Ex. 8); and, finally, "That is a lie. I never got anything." (R. 100.))

During an interview on July 22, 1949, with Mr. Thurman and in the presence of his attorney, Harold Simon, appellant said that he thought the bribes which he had received were simply gifts and that he did not have to pay tax on them, and denied that he had omitted the money from his returns from fear of the local authorities discovering it. Later in the interview, however, he adopted his attorney's statement that the money had been omitted from his returns for fear of apprehension from local authorities. (R. 89, 90.) He later said to Robert W. Davis, Deputy Collector, Bureau of Internal Revenue, that he would have reported the outside income had he known income tax returns were confidential. (R. 164.) It is common knowledge that income tax returns are not open to public inspection or available to the officers of a municipality or state except under certain limited circumstances for the purposes of enforcing state tax laws, and that this has been the law, in substance, since 1913. See Title 26 U.S.C.A., Section 55.

It is not necessary for the Government to adduce direct proof of willful intent. It may be inferred from the acts of the parties that such inferences may arise from a combination of acts.

United States v. Rosenblum, 176 F. (2d) 321, 329 (C.A. 7th);

Battjes v. United States, 172 F. (2d) 1, 5 (C.A. 6th);

Norwitt v. United States, ... F. (2d) ..... (C.A. 9th).

If a man intentionally handles his income so as to avoid making an accurate record of it and then files returns which to his knowledge substantially understate his income, and the tax evasion motive played any part in his conduct, the offense of income tax evasion is made out even though the conduct may also have served other purposes, such as concealment of another crime. *Spies v. United States,* 317 U.S. 492, 499; *United States v. Wexler,* 79 F. (2d) 526 (C.C.A. 2d).

There is sufficient evidence in which the jury could have found that the appellant received unreported income in the nature of bribes from prostitutes and gamblers during each of the years 1944, 1945, and 1946; that he knew he had received this income, that it was income, and that it should have been reported on his income tax returns; that he knew it was not reported on his income tax returns, and that he had as a motive for omitting this income from his returns the evasion of income tax which he knew was lawfully due to the Government of the United States.

D.

There Was Sufficient Proof of a Corpus Delicti to Warrant Admission Into Evidence of the Extrajudicial Statements of the Appellant Made to Agents of the Bureau of Internal Revenue.

The appellant argues, by dint of quotation from the case of *United States v. Fenwick,* 177 F. (2d) 488 (C.A. 7th), that the Government failed to prove a *corpus delicti* sufficiently to admit the extrajudicial statements of the appellant which were made orally

and in writing to Mr. Thurman and Mr. Davis, agents of the Bureau of Internal Revenue. In connection with this contention, it is respectfully submitted that the case of *Bell v. United States,* 185 F. (2d) 302 (C.A. 4th), answers and rejects contentions virtually identical with those made by the appellant in this case and that the *Bell* case, 185 F. (2d) 302 (C.A. 4th), presents a factual situation remarkably similar to that disclosed by the record in this case. The reasoning of the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), which was decided by the United States Court of Appeals, Seventh Circuit, on November 4, 1949, has been consistently denied or distinguished in the *Bell* case, 185 F. (2d) 302 (C.A. 4th), and in other subsequent net worth and expenditure cases.

Brodella v. United States, 184 F. (2d) 823, 825 (C.A. 6th);

Gariepy v. United States, 189 F. (2d) 459, 462 (C.A. 6th).

The *Gariepy* case, 189 F. (2d) 459, 462 (C.A. 6th), made the following reference to the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th):

> "The appellant's reliance upon Bryan v. United States, 5 Cir., 175 F. 2d 223 and United States v. Fenwick, 7 Cir., 177 F. 2d 488 is of little avail to him because there was no such comprehensive investigation either as to the net assets at the base period or subsequent increases as was here undertaken. Moreover, in the Bryan case, a vigorous dissent weakens the conclusion there arrived at, and the Fenwick case appears to be in conflict with United States v. Hornstein, 7 Cir.,

176 F. 2d 217, decided by the Seventh Circuit but a few months prior to Fenwick. Judge Miller of this court, writing in Brodella v. United States, 6 Cir., 184 F. 2d 823, had no difficulty in distinguishing the Bryan and Fenwick cases from cases involving facts similar to those here produced.

"The defensive strategy of the appellant was to remain silent and challenge the government to prove its case. This, of course, he had a right to do but he now urges, upon appeal, that the government had an obligation to establish beyond reasonable doubt that there were no resources other than current taxable income with which to make the substantial expenditures of the prosecution years. * * * The argument borders on the fantastic * * *"

This Honorable Court had occasion to consider the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), in connection with the decision of *Gendelman v. United States,* 191 F. (2d) 993, 996, certiorari denied, ... U.S. ..... Gendelman argued at some length before this court that the judgment should be reversed on the basis of the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th). (Appellant's opening brief, pp. 27-30, 33, 34.) However, the decision reaffirmed the position that this court took in the case of *Barcott v. United States,* 169 F. (2d) 929 (C.C.A. 9th).

The *Fenwick* case, 177 F. (2d) 488, 489, 490 (C.A. 7th), uses the following language:

"* * * the conviction cannot stand unless there is proof of the corpus delicti, existence of which

> cannot be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. * * * In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. Gleckman v. United States, 8 Cir., 80 F. 2d 394, 399; United States v. Miro, 2 Cir., 60 F. 2d 58, 61; O'Brien v. United States, 7 Cir., 51 F. 2d 193, 196. *Inasmuch as there is no direct proof that defendant received income which he did not report,* we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt." [Italics supplied.]

It is submitted that the above proposition of law is not supported by the authorities cited and should not be followed by this court. As was stated by the court in the case of *Bell v. United States,* 185 F. (2d) 302, 309 (C.A. 4th):

> "The defendant relies principally upon Bryan v. U. S., 5 Cir., 175 F. 2d 223, and U. S. v. Fenwick, 7 Cir., 177 F. 2d 488, in both of which it was held that evidence based on the net worth theory was insufficient to support a conviction

of attempting fraudulently to evade the income tax, since the government's case did not exclude the reasonable possibility that the defendant had other assets at the beginning of the period than those shown by the government's statement; and the court directed a verdict saying that the evidence, being circumstantial, must exclude every reasonable hypothesis except that of the defendant's guilt. But we cannot follow these decisions since it is obvious that they are based upon their particular facts and they do not relieve us from the duty of appraising the sufficiency of the evidence in the case before us. *That responsibility does not include a finding as to whether the defendant is guilty beyond a reasonable doubt.*" [Italics supplied.]

The *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), in holding that the Government must establish proof of specific unreported income as a prerequisite to the use of a net worth method of proof of unreported income or, in the alternative, to prove a negative or to refute all possible speculation as to the source of appellant's funds asserted by the Government to prove appellant's net worth, departs from a well established line of authority both prior and subsequent to the decision in that case.

Gariepy v. United States, 189 F. (2d) 459, 463 (C.A. 6th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th);

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

United States v. Hornstein, 176 F. (2d) 217, 220 (C.A. 7th);

Schuermann v. United States, 174 F. (2d) 397, 399 (C.A. 8th).

The best exposition of the applicable rules surrounding the admission of a defendant's extrajudicial statements and the requirements of proof of *corpus delicti* where the net worth method of proof is used may be found in the case of *Bell v. United States,* 185 F. (2d) 302, 309 (C.A. 4th):

> "The defendant, pointing out that the government's case against him consists of the net worth statements and his own admissions, contends that the case must fall on the ground that the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant. This argument assumes that the net worth statements in themselves furnish no substantial evidence whatsoever of the corpus delicti in this case; but is not true, as we have seen. Moreover, the rule does not require that the corpus delicti be completely shown by evidence aliunde defendant's confessions, but admits the confessions where other substantial evidence of the crime is shown, and thereupon both the statements of the defendant and the independent evidence must be taken into consideration by the jury in determining whether guilt is proven beyond a reasonable doubt. In Daeche v. U. S., 2 Cir., 250 F. 566, 571, cited with approval in Warszower v. U. S., 312 U. S. 342, 345, 61 S. Ct. 603, 85 L. Ed. 876, it was said: '* * * The corrob-

oration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof.' See also, Yost v. U.S. 4 Cir., 157 F. 2d 147, 150; Forte v. U. S., 68 App. D.C. 111, 94 F. 2d 236.

"In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; and this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through his employees either during the agent's investigation or the trial in court. It is true that the burden of proof resting upon the government does not shift during the progress of a criminal case but when in the trial of charges of income tax evasion discrepancies between the taxpayer's re-

> turns and his actual income are *indicated* by the government's proof, the failure of the defendant to offer explanation in any form may be considered by the jury in finding its verdict. In Rossi v. U. S., 289 U. S. 89, 91, 53 S. Ct. 532, 533, 77 L. Ed. 1051, the court said: 'The general principle, and we think the correct one, underlying the foregoing decisions, is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.' See also, Jelaza v. U. S., 4 Cir., 179 F. (2d) 202; U. S. v. Hornstein, 7 Cir., 176 F. (2d) 217, 220; Bradford v. U. S., 5 Cir., 130 F. (2d) 630." [Italics supplied.]

Furthermore, it is the contention of the Government that the prerequisite proof of *corpus delicti* as set out even in the *Fenwick* case, 177 F. (2d) 488, 490 (C.A. 7th), exists in the record. In this connection, it should be noted that the Government *did* produce "direct proof that the defendant received income which he did not report" through the testimony of Jerry Robinson. (R. 33, 36.) In addition, it is submitted that the net worth of William R. Davena, Jr., was established by evidence independent of any admissions which he made to the Government agents, as shown by the following schedule:

NET WORTH OF WILLIAM R. DAVENA, JR., AS ESTABLISHED BY EVIDENCE INDEPENDENT OF HIS ADMISSIONS

Item	Dec. 31 1943	Dec. 31 1944	Dec. 31 1945	Dec. 31 1946	Record Pages	Witness
1. Savings account, Benicia	$ 504.08	$ 920.39	$ 989.61	$ 1,090.05	37-39	Frank Bernardo
2. " " Vallejo				6,000.00	41	Robert E. Arvedi
3. Commercial account, Benicia	635.60	791.30	1,061.60	847.42	39	Frank Bernardo
					(39, 40	Frank Bernardo)
4. House, 127 "J" St., equity	789.00	969.00	4,913.00	4,913.00	(42, 43	Gary Rees)
					(45-47	Leonora F. Silveira)
5. Russold improvements			750.00	1,150.00	48, 49	Mrs. Mary Russold
6. War Bonds	75.00	168.75	243.75	243.75	77, 78	Donald J. Thurman
7. House, 125 "J" St.*				7,150.00	51, 52	Genevieve Bennett
8. Automobiles		2,172.91	2,172.91	2,671.53	(56	E. R. Trethway)
					(59, 60, 61	Frank Coronado)
9. Liabilities	0	0	0	0	(156	Donald J. Thurman)
					(166	Robert W. Davis)
Totals	$2,003.68	$5,022.35	$10,130.87	$24,065.75		
Increase in Net Worth		$3,018.67	$ 5,108.52	$13,934.88		
10. Withholding taxes paid		285.60	270.00	188.80	32	John H. Reedy
11. Refunds received		(52.51)	(22.63)	(16.24)	32	John H. Reedy
Totals		$3,251.76	$ 5,355.89	$14,107.44		
Adjusted Gross Income per Returns		3,475.00	3,560.00	3,620.00	Exs. 2, 3, 4	John H. Reedy
Difference		($223.24)	$ 1,795.89	$10,487.44		

*Or cash on hand.

It may be argued by the appellant that the above schedule discloses a deficiency in proof of unreported income for the year 1944, but it should be noted that living expenses of the appellant are in no wise taken into account, and it is a matter of common knowledge that appellant could not have lived on $223.24 for the entire year 1944. In any event, such proof is sufficient as to the years 1945 and 1946 and, as heretofore argued, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict must be affirmed if the evidence sustains the conviction on any one count. See cases cited *supra,* at pages 17-18.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment and sentence of the Court should be affirmed.

Dated, San Francisco, California,
April 18, 1952.

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